



ARTICLE 370 AND THE ASYMMETRICAL FEDERALISM OF INDIA

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ABSTRACT

The J&K state which enjoys far greater status than other states within quasi federal polity of india was one of the 562 princely states in British ruled india. In almost all the cases these princely states surrendered whatever notional sovereignty they had to the new Indian state in exchange for guaranteed privy purses. whereas other Indian states lost their whatever kind of notional sovereignty they had by supplementary instruments and by agreeing to the settlement of their position and powers by constituent assembly of india .j&k choose to remain a unit of Indian federation only on the terms and conditions specified in instrument of accession .The state of j&k has been accorded asymmetric status under Indian federalism because of the peculiar circumstances under which it acceded to the union of india.

KEYWORDS: Asymmetric, integration, bargaining, procedure, applicable.

Outline and Objectives of the paper:-

- Introduction about the idea, meaning and origin of asymmetrical federalism in india.
- Analysis of the case of J&K and Indian federation. In this section the background for the asymmetry of the state within india is discussed.
- Asymmetry of J&K within Indian federations. In this section a thorough analysis of the asymmetrical status of the state has been made. Article 370 has been discussed in terms of its provisions and the erosion of the provisions by Indian govt
- Concluding remarks about the special status and the need for its restoration.

INTRODUCTION:

India became an independent democratic nation in Aug 1947 and constitutional Republic in Jan 1950. The constitution of India clearly provided a federal set up with states as subnational entities that were assigned specific political and fiscal powers. Even though the central govt was vested with a large discretion and residual authority over the constituent units either explicitly or through escape clauses resulting in a relatively centralized federation, but still then various provisions of within Indian constitution can be enlisted to highlight the asymmetrical federal nature of Indian constitution. There are 10 more states within Indian federation that have been dealt with special arrangements. Asymmetrical federalism is understood to mean federalism based on unequal powers and relationships in political, administrative and fiscal arrangements. The asymmetrical arrangement in Indian federalism has a long history and goes back to the way Britishers unified the country under their direct control and various principalities were integrated in the Indian union and later the way in which territories in which territories under the direct control of the British and the principalities were integrated in the indian union.² The British Indian states were easily integrated in the Indian union while the princely states were integrated through instrument of accession by the then incumbent rulers of the respective states. The evolution of asymmetrical federalism in india between the centre and states i.e vertical federalism and among the states i.e horizontal federalism traces its origin much to the historical and political factors in consonance with the views of Charles D Tarlton who held long before that "when we turn our attention away from formal constitutional legal relationships, then it is clear that cultural, social, economic and political factors in combination have in all federations produced asymmetric variations in power and influence of different constituent units and that these affect the degree of harmony or disunity within these federal systems". Indian federation is based on four kinds of asymmetries. First, there is universal asymmetry affecting all states e.g representation in Rajya Sabha to states ,second, there are specific asymmetry with regard to administration of tribal areas, intra regional disparities etc, third kind of asymmetry in Indian fededarlism relates to a special kind of federating units called Union Territories and the fourth is special asymmetry relating to states of J&K, Nagaland and Mizoram (art 370,371A,371G)⁴.

Case of Jammu and Kashmir and Indian federation:

Jammu and Kashmir enjoys special status within Indian constitution vis a vis other units. Art 370 is an important provision of Indian constitution which highlights the asymmetrical nature of Indian federalism. The Jammu and Kashmir enjoys far greater status than other states within the quasi- federal constitutional set up of india. Jammu and Kashmir was one of the 562 princely states in British ruled India. In almost all the cases these princely states surrendered whatever notional sovereignty they had to the new indian state in exchange for guaranteed

privy purses. At the time of accession, it was made clear to all the Indian states that their internal autonomy would be safeguarded and they would not be obliged to accept the Indian constitution. However whereas other Indian states lost their whatever kind of notional sovereignty they had by supplementary instruments and by agreeing to the settlement of their constitutional position and powers by the constituent assembly of india, Jammu and Kashmir decided to remain a unit of Indian federation only on the terms and conditions as specified in the of Instrument of Accession signed by Maharaja Hari Singh in oct,1947. The state of J&K was accorded asymmetric position under Indian federation because of the special circumstances under which the state acceded to india. The asymmetric federalism as held by W.Riker is an "after effect of a rational bargain among the distinctive constituents for political and economic advantages and the rational bargain in case of J&K has been the Instrument of Accession⁵."The special position was accorded to the state Maharaja Hari Singh acceded to india on three subjects viz- defence, foreign affairs and communication. Sardar V Patel, the then home minister and the person who played an important role in the integration of princely states declared in the constituent assembly of india that "in view of the special problem with which the J&K govt is faced, we have made special provisions for the continuance of the state with the union on the existing basis". The special provisions were that of art 370 and the existing basis were the instrument of accession. As already mentioned that Indian constitution provides for asymmetrical provisions with respect to ten more states , however the case of J&K seems to be a case sui- generis as being a distinct, unique and special in itself and hence cannot be compared with other states within the federation .While the history of J&K conflict has been much debated and extensively written ,here our focus of study is that the state acceded to the union of india under very special terms that were later on incorporated in art.370 of the Indian constitution. The special status of J&K within india does come out of art.370 but it merely represents in bodily form what has been set out in the Instrument of Accession. Hence that is why the constitutional experts hold that it is not possible to enlarge the application or annul of art.370 unilaterally .It was basically accession with autonomy.

Constitution of India and asymmetry vis a vis Jammu and Kashmir:

In order to describe the asymmetrical nature of Indian federation with respect to the state of J&K, it is necessary to analyse the provisions of art 370 of Indian constitution which is the foundation stone of the special position accorded to the state. Art 306A of the draft constitution after having been fully discussed, debated and explained by the constituent assembly of india was placed in part XXI as art 370 under the heading "Temporary and Transitional provisions". It was on 26 jan 1950, the first Constitution Application Order to J&K was issued by the then president in consultation with govt of J&K under clause (1) of art 370. Art 370 which came into force on 26 jan 1950 is a particular provision not only from procedural point of view but also regarding its content⁶. According to famous constitutional expert A.G Noorani, whereas the constituent assembly of india debated all other provisions in detail, it only rubberstamped the draft of art 370 which resulted from the intergovernmental bargaining between sheikh Abdullah and Pt. Nehru⁷. This was not act of pure generosity on the part of Indian govt but being under compulsion to do so as Shiekh Abdullah govt didn't allow constitution of india to prescribe the state constitution according to A S Anand⁸. The only articles that apply to the state of J&K from Indian constitution are art 1 and art 370. The first art defines J&k as territory of india and its state.

The constitutional provisions provided by art 370 and the subsequent constitutional (application to J&K) orders promulgated by the president of india provide for partial application of Indian constitution to J & K state. In their application to J &K, the provisions of Indian constitution can be divided into three categories⁹.

- A) The provisions which are not applicable to J&K
- B) The provisions which are applicable to the state with exceptions and reservations and
- C) The provisions which are applicable to the state.

The categories A and B are the two matters of our concern here in describing the asymmetrical nature of Indian federalism in relation with J&K both vertically as well as horizontally. The Indian constitution displays remarkable and apparent asymmetry towards J&K in comparison to other states. The following points will bring into sight the asymmetry of Indian constitution towards J&K.

- i) The state of J&K has its own constitution framed by the state constituent assembly provided by art 370. None of the Indian states has its own constitution and the Indian constitution contains the provisions of the states as well. The constitution of J&K came into force from 26 Jan 1957.
- ii) The art 3 of the Indian constitution which relates with the changing state's name and altering its boundary etc by the parliament is not applicable to J&K in the manner as it applies to other states. No bill providing for increasing the area or changing the name of J&K or amalgamating any of its part with other state can't be introduced in parliament without the express consent of the state legislature. Parliament can't do it unilaterally.
- iii) Art 249 and art 250 which relate with the parliamentary legislation power on any item in the state list during emergency are not applicable to the state even if such matters are in the national interest as a whole.
- iv) The hallmark principle of division of power in Indian federalism between centre and states into three lists viz union list, state list and concurrent list also shows remarkable asymmetry in relation to the state. The law making powers with respect to J&K are limited to union list only and to the matters in concurrent list as have been made applicable to the state. Furthermore residuary powers have been assigned to the state—an exception.
- v) With regard to the Emergency power under art 352, it is not applicable in totality to the state. In case of J&K, only external emergency clause is applicable and the armed rebellion clause emergency can be made applicable only when the state govt requests or gives concurrence to that effect. Art 356 and art 357 were not applicable upto 1964 and were extended to the state in 1964.
- vi) Art 360 dealing with Financial emergency in India is not applicable to J&K.
- vii) The state of J&K has its own chapter of directive principles of state policy in part iv of the state constitution. Hence part iv of Indian constitution dealing with DPSP is not applicable to J&K.
- viii) The part iii of Indian constitution dealing with fundamental rights is applicable to the state with certain exceptions and reservations. It was not originally applicable to the state in 1950 but was later on made applicable in 1954 with certain omissions and modifications. In J&K right to property (art 31) is still fundamental right but not in other states of Indian federation.
- ix) The permanent residents of J&K are treated with special privileges under art 35A dealing with matters of acquisition of property, employment, scholarship etc. This art was made applicable to the state of J&K through presidential order of 1954¹⁰.
- x) The provisions of art 368 of Indian constitution dealing with the method of constitutional amendment are not applicable to J&K, however they can be made applicable to the state subject to the concurrence of the state govt and ratification by constituent assembly.
- xi) The state of J&K has its own state flag. This was provided in connection with the historical factor of J&K freedom struggle against the autocratic Dogra rule, however the national flag would stand superior than the state flag.
- xii) The state of J&K originally differed from other Indian states with respect to the nomenclature of head of state and head of the govt. In J&K the head of the state was originally designated as Sadr-i-Riyasat and the head of the govt was known as prime minister rather than governor and chief minister as they are known in other Indian states. This provision was eroded in 1965 by constitutional amendment and the state has been brought at par with other states.
- xiii) Election procedure for electing members of parliament was originally different in J&K. In J and K the members of parliament were earlier appointed by president of India on the recommendation of state legislature. However this provision has also been done away in 1965 and the state has been brought on equal terms along with other units.

It is not out of context to mention here that there were various other provisions

that were applicable to the state with exceptions and reservations relating to citizenship, jurisdiction of high court, official language of the state etc¹¹. It follows from the above elaborated provisions that J & K though an integral part of India had a unique position within the Indian federation. The art 370 was described by the then home minister of India as a “device to continue the existing relationship of J & K with the Indian union.” However with the passage of time it was realized by the successive regimes at New Delhi that the special granted to the J & K within Indian federalism is to be eroded and the state is to be fully integrated. The asymmetry within Indian federalism and the grant of special status to the J&K was treated as state within state by Hindu nationalist lobby of India¹². Under the mounting pressure from various quarters and the rise of voices like instead of Kashmir acceding to India, it was India that acceded to Kashmir, the govt of India through gradual and well thought out manner from 1954 began to scrap the special status of J&K. The special status was badly eroded during the rule of Bakshi Gh. Mohammad from 1953-64. According to Sumantra Bose Bakshi's rule was a sort of contractual relationship between New Delhi and J&K whereby Bakshi was allowed to run unaccountable, unrepresentative govt in Srinagar in return for J & K's integration. After little over a decade of enactment of art 370 prime minister of India Pt. J. L. Nehru declared in Lok Sabha on 27 Nov 1963 that “art 370 has been eroded There is no doubt that Kashmir is fully integrated We should allow it to go on”. The fact of its erosion was also declared by Gulzari Lal Nanda as “what happens is that only the shell is there. Art 370 whether you keep it or not has been completely emptied of its contents Nothing has been left in it”. The nature and extent of this erosion was to such an extent that the state was brought to status far lower than other states of the Indian republic. The extent of erosion of special status can be imagined by the figures like, total articles applied is 260/395 balance = 135, union list entries applied is 94/97 balance = 3 and concurrent list entries applied 26/47 balance = 21.

Conclusion: The asymmetrical nature of Indian federalism vis a vis J&K has not remained the untouchable provision for the political elites at New Delhi. The political dispensation at the citadel of power in New Delhi right from the accession of the state to present period worried about the full integration of the state with the Indian union. Hence over the past 65 years the union govts in collaboration with the supportive state govts, have carried out the agenda of erosion in a gradual and piecemeal manner through presidential orders. The need of the hour is that in order to prevent and further beautify the secular crown of India, the special status granted to J&K should not only be restored but also strengthened more. The misperceptions and the hollow claims attached with the asymmetrical status of J&K as being tool for the service of Muslims of J&K, breeds secessionism, its abrogation can bring national integration etc need to be examined afresh. Incorporation of Art 370 was an approach to diversity by limiting the powers of union legislature and to safeguard the sphere of state autonomy. The erosion of special status has alienated the people in Kashmir from the national mainstream and reduced the level of trust in Indian leadership. The restoration of special status as stressed by different peaceniks and intellectuals world over is the most potent instrument of bringing peace in the turbulent state of J&K which lies at the flash point of nuclear war. In case of J&K of restoration and thereafter safeguard of special status is projected as conflict resolution mechanism besides other constitutional implications. In the current era of globalization and decentralization, the restoration of federal asymmetry to J&K gets extra impetus. The restoration of special status granted to the J&K within Indian federalism will help in building trust among the Muslims in state and abroad who in the era of growing religious intolerance, cow vigilantism, love jihad etc in India consider the ruling regime at Delhi as anti Muslim. The restoration of art 370 is in tune with the requirements of plural society like ours. Let it be mentioned here that for the sake of restoration of special status of J&K even if constitutional amendments in basic structure are effected, they should be because as goes the saying “A stitch in time saves nine”.

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